



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1016 OF 2013

CONCEPTER NAFULA WAMALWA1ST PLAINTIFF

KEVIN SIMIYU MATUMBAI.....2ND PLAINTIFF

VERSUS

DIANA KAPEEN KIBOR.....DEFENDANT

RULING

The Application

The application before the court is a Notice of Motion dated 29th August 2013 filed by the Plaintiffs, seeking orders of a temporary injunction against the Defendants to restrain them from possessing, occupying, remaining on, constructing and/or interfering with the Plaintiffs' quiet possession, occupation, enjoyment, ownership, legal, contractual and equitable rights and interest on all that parcel of land known as Plot No. P 5198 measuring 0.082 hectares and also known as L.R No. 209/14494 (hereinafter referred to as the "suit property"), or claiming interests, rights or in any way dealing with or trespassing onto or continuing further trespass on the suit property.

The application is based on the grounds that the Plaintiffs are Administrators of the estate of Moses Matumbai (hereinafter "the Deceased") pursuant to Grant of Letters of Administration issued on them in Nairobi High Court Succession Cause No. 268 of 2006. Further, that the Deceased is the leasehold proprietor of the suit property, and that at the time of allotment of the Plot to the Deceased on or about 17th December 1998 the suit property was yet to be surveyed but that it was subsequently surveyed and the Plaintiffs fulfilled all the obligations for survey and issuance of certificate of lease and made all the requisite payments.

The Plaintiffs aver that their occupation, use the enjoyment of the plot was peaceful until on or about 15th July 2013 when the Defendant accompanied by her agents, employees, and servants descended on the suit property, demolished the Plaintiffs' structures thereon, put a container on the plot and physically assaulted the 1st Plaintiff. Further, that unless the Defendants are restrained, the Plaintiffs who have all supporting documents and have always been in occupation and possession of the suit property will suffer irreparable loss, whilst the Defendant will suffer no prejudice as she has not shown any documents of ownership to the said property.

These grounds are reiterated in the supporting affidavit to the application sworn by the 1st Plaintiff on 31st August 2013 wherein it was further stated that the Defendant is a county representative in the Country Government of Nairobi, and to which the photographs showing the destruction of the Plaintiff's structures on the suit property, their letters of administration, their allotment letter, survey letter and Deed

plan letter were attached. The Plaintiffs averred that the Defendant's claim to possession to the suit property amounts to trespass and is contrary to their proprietary rights and interests thereon.

The Response

The Defendant opposed the Plaintiff's application in a replying affidavit sworn 6th September 2013. She denied that she was interested in acquiring and/or possession the suit property or that she had deposited any container in the suit property for her personal use. She further denied that the suit property belongs to the Plaintiff, or that it is the one described by the Plaintiff.

The Defendant averred that the suit property is vacant public land adjacent to the road, and that the same has always been vacant. Further, that the Plaintiffs have never occupied and/or possessed the suit property, and that they are fully aware that the alleged container is a temporary office that was deposited in the said public land by the County Government of Nairobi, for the Defendant to use as a temporary office pending the completion of the designated County Representative Office in the South C Ward.

The Defendant further averred that the Plaintiffs are not entitled to administer the suit property which is a public property and is not owned by the deceased, and which has always been in the legal custody and occupation of the City Council of Nairobi and now the Nairobi County Government. Therefore, that the Plaintiffs have no legal or equitable rights enforceable with respect to the suit property, and cannot therefore be deprived of possession and quiet enjoyment of property which does not belong to them.

The Issues and Determination

The parties were directed to file written submissions on the Plaintiff's application. The Plaintiff's counsel filed submissions dated 10th February 2014, while the Defendants' counsel filed submissions dated 23rd February 2015. I have read and carefully considered the pleadings filed and submissions made by the parties herein. The question to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction.

I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiffs in their submissions urged the Court in this respect to find that they had provided *prima facie* documentary evidence to confirm that they are entitled to the suit property and that any adverse actions by the Defendant is contrary to their interest of ownership of the same. Further, that the Defendant has not in any way challenged their right to ownership and possession of the suit property, or the authenticity of their documents of ownership.

The Defendant on the other hand submitted that the Plaintiffs do not have any proprietary interests in the suit property and that the letter of allotment they rely upon refers to an unsurveyed parcel and the corresponding map was not produced in court, and it is not possible to ascertain which parcel of land it refers to. Further, that the Defendant is lawfully on the suit property with the permission of the Nairobi County Government, which as owner of the suit property also has a right to be heard. The Defendant

relied on the holding in **Pashito Holdings & Another vs Ndungu & 2 Others KLR(E&L)1** in this regard.

Lastly, the Defendant submitted that the Plaintiffs will not suffer any irreparable damage that is not capable of compensation as the suit property was vacant before the Defendant took possession of the same. Further, that the Defendant is on the other hand utilising the suit property for the public good.

I have perused the evidence annexed by the Plaintiffs to show their entitlement to the suit property. The letter of allotment they rely upon dated 17th December 1998 issued to Moses Matumbai refers to an unsurveyed commercial plot no "F" in Nairobi South C. No plans, maps or any other evidence was brought by the Plaintiffs to show the connection between the said plot in the letter of allocation and the suit property which they describe as as Plot No. P 5198 measuring 0.082 hectares and also known as L.R No. 209/14494. In the circumstances this Court finds that the Plaintiffs have not shown a *prima facie* case, and are not entitled to the orders sought in their Notice of Motion.

The Plaintiffs Notice of Motion dated Notice of Motion dated 29th August 2013 is accordingly dismissed, and the Plaintiffs shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____20th____ day of

____March____, 2015.

P. NYAMWEYA

JUDGE